No. 98-1204

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Supreme Court of the United States

October Term, 1998

VICTORIA L. BRADSHAW, an individual, in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER, an individual in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual in her official capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California,

Petitioners,

v.

G & G FIRE SPRINKLERS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent G & G Fire Sprinklers, Inc., respectfully requests that this Court deny the petition for writ of certiorari which seeks review of the Ninth Circuit's opinion in this case. That opinion is reported at 156 F.3d 893 (9th Cir. 1998).

STATEMENT OF THE CASE

I. Factual Background

Petitioners here are the California Division of Labor Standards Enforcement ("DLSE"), the Department of Industrial Relations ("DIR"), and officials thereof (hereafter, collectively the "state" or "petitioners"). The DLSE and DIR are responsible for enforcing provisions of the California Labor Code dealing with the prevailing wage law. A-8; Cal. Lab. Code §§ 1720-1861; Pet. at 2-3. G & G Fire Sprinklers, Inc. (respondent) is a fire protection company which installs sprinkler systems, frequently as a contractor or subcontractor on public works projects.[1]

The state's petition challenges a decision of the Ninth Circuit Court of Appeals which held that provisions of the California Labor Code authorizing the state to seize earnings of subcontractors who have allegedly failed to comply with prevailing wage requirements violate due

[1] Pursuant to Supreme Court Rule 29.1, Respondent G & G Fire Sprinklers, Inc. advises the Court it has no parent company or subsidiaries.

process by not providing for a pre- or a timely post-deprivation hearing.

The relevant facts are set forth in the amended opinion of the Ninth Circuit Court of Appeals.[2] As noted in that opinion, under the statutory scheme at issue, all contractors and subcontractors who enter into public works contracts are required to pay the prevailing local wage to their workers. A-8; Cal. Lab. Code § 1771. If a contractor or subcontractor is not in compliance with provisions of the prevailing wage law, it may be required to "forfeit" the differential between the amount being paid and the amount determined to be owed to workers under the "prevailing wage" law. A-8; Cal. Lab. Code § 1775. In addition, the Labor Commissioner may impose fines for failure to comply with certain other provisions of the code related to enforcement of the prevailing wage provisions. See Cal. Lab. Code §§ 1727, 1775, 1776, 1777.5, and 1813. The public entity which enters into a public works contract (the "awarding body") is required by statute to withhold any sums "forfeited" – including fines – from payments due the contractor. Cal. Lab. Code § 1727. No sums may be withheld without a full investigation by either the awarding body or the DLSE unless the withholding is from the final payment to be made to the prime contractor. *Id.* Issuance of a notice to withhold

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[2] The original opinion of the Ninth Circuit was issued February 3, 1998. The decision was amended September 10, 1998, and that amended decision is found at 156 F.3d 893. For consistency and the convenience of the Court, citations in this document are to the amended decision contained in the appendix to the Petition for Writ of Certiorari, at A-2 to A-38.

to an awarding body is a standard procedure utilized by the DLSE. A-9.

Where it is a subcontractor who has purportedly violated the prevailing wage law, the prime contractor is authorized by statute to withhold from the subcontractor's earnings an amount identical to sums which have been withheld by the awarding body. A-9; Cal. Lab. Code § 1729. The Labor Code requires that all public works contracts contain provisions stipulating to these withholdings. Cal. Lab. Code §§ 1775, 1776, 1777.5, and 1813; see also A-9.

The "exclusive remedy after withholding" is a lawsuit by the prime contractor or its assignee to recover the payments withheld. A-9; Cal. Lab. Code § 1733. If no lawsuit is filed within 90 days, the money is forwarded to the State Treasurer. Cal. Lab. Code § 1730. Amounts collected as wages are distributed to workers, and the fines and penalties become part of California's general fund. Cal. Lab. Code §§ 1730, 1775.

Here, the DLSE, exercising its authority under California Labor Code section 1727, issued withholding notices to the awarding bodies for three projects on which respondent was employed as a subcontractor, directing those bodies to withhold at least $120,000 already earned by respondent on these projects. A-10; see also Pet. at 3. Pursuant to the statutory scheme, the money was withheld from each prime contractor, who, in turn, withheld the money from respondent. A-10. There was no evidence respondent was notified of the basis for the DLSE's decision to withhold these funds, A-10, and the Labor Code does not grant subcontractors like respondent the right to

"any type of hearing to contest a withholding," A-15. Moreover, respondent had no right to challenge the withholding by bringing an action directly against the DLSE, since it had no contract with the DLSE or any other state body. A-15. Finally, lacking privity of contract with the awarding body, respondent had no right to bring a cause of action against that body either, unless the prime contractor assigned its own cause of action to respondent. A-15.

II. Procedural History

Respondent filed this action for declaratory and injunctive relief on July 21, 1995, asserting that the DLSE's issuance of statutory notices to withhold, without providing a prior hearing, constituted a deprivation of property without due process of law. A-10.

The district court granted respondent's motion for summary judgment, while denying the state's motion to dismiss. Holding that the specified provisions of California's Labor Code were unconstitutional, the court permanently enjoined the state from enforcing those statutes against respondent.[3] A-7 to A-8.

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[3] Specifically, the district court declared unconstitutional the following Labor Code provisions: section 1727 (granting awarding body authority to withhold all wages and penalties forfeited pursuant to these provisions from payments due the contractor); sections 1730-33 (providing that wages and penalties withheld be transferred to the Labor Commissioner, to be retained until after outcome of litigation, if any, by contractor or its assignee, and limiting period in which to bring such an action to 90 days); section 1775 (providing a penalty of up to $50

Petitioners sought review in the Ninth Circuit Court of Appeals. On February 3, 1998, that court issued its original opinion in the matter, Judge Kozinski dissenting. A-39 to A-76. Petitioners filed a petition for rehearing which was granted, and the Ninth Circuit issued its amended opinion and order on September 10, 1998, Judge Kozinski again dissenting. Pet. at 2, 10; A-35.

In its amended decision, the Ninth Circuit first determined respondent had standing to challenge the constitutionality of the statutory scheme in question, having demonstrated (1) an injury (in the form of $120,000 it had earned but which was being withheld by the state), A-11 to A-12; (2) a causal connection between that injury and the conduct complained of (since it was respondent the state had investigated and who was "clearly the 'object of the action' " taken by the state), A-13; and (3) that the injury would be redressed by a favorable decision in this action, A-11 to A-14.

The court also found respondent had satisfied the requirements for asserting a due process claim, in that it had a protectible property interest "in being paid in full for the construction work it has completed." A-16 to A-17, citing *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 342 (1969). The court concluded that the statutory scheme, which provides neither a pre- nor post-deprivation hearing at which respondent could challenge the

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per worker per day for each worker not paid the prevailing wage); section 1776(g) (assessment of penalties for failure to comply with a request for payroll records within ten days); and section 1813 (assessment of penalties for overtime work performed). A-7.

"validity of the state's findings," violated the Due Process Clause of the Fourteenth Amendment. A-23.

Nevertheless, the Ninth Circuit found the injunction issued by the district court overbroad in two respects. First, the Ninth Circuit held the statutory withholding provisions need only be declared unconstitutional *as applied*, allowing the state to remedy the violation by the adoption of regulations providing a pre-deprivation hearing or a prompt post-deprivation hearing. A-27; see also, A-22. Second, the court found that rather than granting "a permanent injunction prohibiting the state from enforcing the withholding provisions against G & G," the appropriate action was to enjoin the state from enforcing those provisions unless it chose to adopt reasonable hearing procedures within a reasonable period of time.[4] A-27.

As noted, Judge Kozinski dissented, asserting that the majority decision was bad policy and turned every public works contract into a protectible property interest. A-35 to A-38.

The state petitioned again for rehearing and rehearing en banc. See, e.g., Pet. at 2. Those motions were denied on October 28, 1998, Judge Kozinski voting to grant rehearing and rehearing en banc. See Pet. at 11.

The Petition For Writ of Certiorari was filed January 26, 1999.

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[4] The state subsequently adopted certain temporary "emergency" regulations. See Cal. Code Regs., tit. 8, §§ 16410-16414; see Respondent's Appendix ("RA")-1.

REASONS FOR DENYING THE WRIT

I. THIS CASE DOES NOT RAISE THE QUESTION PRESENTED IN THE PETITION. THE NINTH CIRCUIT'S DUE PROCESS ANALYSIS WAS BASED ON THE STATE'S EXERCISE OF ITS REGULATORY POWERS, NOT UPON BREACH OF CONTRACT. THE DECISION THEREFORE DOES NOT CONFLICT WITH CASES FROM OTHER CIRCUITS.

A. Petitioner Has Mischaracterized The Issue Decided By The Court Of Appeals.

In its petition for certiorari, the state presents the following single question:

> "Is a commercial contractor who claims that a public agency breached a contract by failing to make payment entitled by the Due Process Clause of the Fourteenth Amendment to anything more than the opportunity to pursue its contract claim through an ordinary state court lawsuit?" (Pet. at i.)

That question, however, is not raised by the decision of the court of appeals, or by the trial court record upon which that decision was based. In this lawsuit, respondent challenged the DLSE's enforcement of specific provisions of California's Labor Code. Respondent did *not* claim the DLSE's conduct breached any agreement to which respondent was a party. Accordingly, the court of appeals was not asked to decide – and did not hold – that a contractor is entitled to a due process hearing concerning every dispute which arises out of the breach of a public works contract.

Instead, the question before the Ninth Circuit was:

> "[W]hether certain California Labor Code provisions, authorizing the state to seize money and impose penalties for a subcontractor's failure to comply with prevailing wage requirements, violate the Due Process Clause of the Fourteenth Amendment because no notice or hearing is required before such adverse action is taken." A-7.

The court concluded that because respondent had demonstrated a vested property interest (that is, money earned and due for contractual obligations already performed), and because the DLSE – *which was not a party to the agreement* – had deprived respondent of those contractual earnings without adequate procedural protections, respondent had stated a due process claim. See A-7 to A-24.

Although the state now claims the Ninth Circuit's decision has effected a "sweeping expansion of property rights and due process protections," Pet. at 15, this contention is pure hyperbole. The state's claim of unwarranted constitutional expansion rests entirely upon its mischaracterization of the issue actually decided by the court. In fact, the decision below breaks no new due process ground, and engenders no conflict with cases from other circuits. The Ninth Circuit simply applied well-established due process principles to the regulatory conduct at issue in this case. We now explain more fully.[5]

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[5] As noted above, before commencing its due process analysis, the court of appeals first determined respondent had standing to bring this action for declaratory and injunctive

B. The Ninth Circuit Properly Held That Respondent's Entitlement To Monies Already Earned Under Contract Is A Protectible Property Interest.

At the outset of its Fourteenth Amendment analysis, the Ninth Circuit noted that a due process claim has two elements: "(1) a deprivation of a protectible interest, and (2) denial of adequate procedural protections." A-16, citing *Goldberg v. Kelly*, 397 U.S. 254 (1970). Therefore, in reviewing the constitutional propriety of the state's actions in this case, the Ninth Circuit first considered whether respondent possessed a property interest protected by the Due Process Clause of the Fourteenth Amendment. Citing *Board of Regents of State Colleges v. Roth*, 408 U.S. 569-570 (1972), the court evaluated "(1)

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relief. The court based this conclusion on the state's withholding of some $12[illegible],000 to which respondent claimed entitlement, finding this to be a concrete and particularized injury, caused by the state, which could be redressed by way of this legal action. A-11 to A-16, citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). Concerning causation, the court held respondent was "clearly the object of the [state's] action," and it was the state's action which in turn had caused respondent's injury. A-13 to A-14.

The state has essentially abandoned its standing argument (which had been predicated on the lack of privity between respondent and the awarding bodies), merely alluding to it once in a footnote in the petition. See Pet. at 16, n. 10. It should be noted, though, as the Ninth Circuit explained, that cases such as *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773 (1980), cited by the state below and again in footnote 10 of the petition, considered whether the plaintiff had a property interest protected by due process, not whether the party had standing. See A-11, n. 2.

what type of interest has been deprived, and (2) whether that interest is protected by the Due Process Clause." A-16 to A-17. The court concluded respondent had a "property interest in being paid in full for the construction work it has completed" under its contract. A-17, citing *Sniadach v. Family Finance Corp., supra,* 395 U.S. 342.

There is nothing remarkable about this conclusion. Although the state suggests otherwise, the Ninth Circuit was well aware that "not all public contracts give rise to a protectible due process interest," A-17, citing *San Bernardino Physicians' Servs. Med. Group, Inc., v. County of San Bernardino,* 825 F.2d 1404, 1408 (9th Cir. 1987), and that " 'the Fourteenth Amendment was not intended to shift the whole of the public law of the states into the federal courts,' " A-17, quoting *Brown v. Brienen,* 722 F.2d 360, 364 (1983). The court merely found that this respondent, in this case, did possess a vested property interest in money already earned under its contracts, and that this interest was entitled to due process protection.

The state argues that because the contract between the prime contractor and the awarding body stipulated to the withholding of payments to cover unpaid prevailing wages and related penalties, respondent had no protectible property interest in monies already earned. Citing *S & D Maintenance Co. v. Goldin,* 844 F.2d 962 (2nd Cir. 1988), and *Christ Gatzonis Electrical Contractor, Inc. v. New York City School Construction Authority,* 23 F.3d 636 (2nd Cir. 1994), the state suggests respondent's right to be paid for work completed was too insecure to be a property interest. Pet. at 17-18.

The state is mistaken, and its reliance on the above Second Circuit cases is misplaced, for those decisions involved facts functionally different from the present case. In *S & D Maintenance Co. v. Goldin, supra,* for example, plaintiff entered into contracts with the city to maintain its parking meters. When the city refused to pay certain invoices submitted under the contract pending a criminal investigation into corruption charges related to procurement of one of plaintiff's contracts, plaintiff filed suit alleging a due process violation. The court held plaintiff possessed no cognizable property interest because under the agreements in question, the city essentially had sole discretion whether to make interim payments, and whether to continue the contractual relationship. *S & D Maintenance Co. v. Goldin, supra,* 844 F.2d at 968, 969.

Similarly, in *Christ Gatzonis Electrical Contractor, Inc., supra,* plaintiff entered into electrical contracting agreements with the New York School Construction Authority (the "SCA"). When the president of plaintiff company was arrested on bid-rigging and bribery charges concerning one of the contracts, the SCA refused to honor plaintiff's payment requisitions, causing plaintiff to bring suit. The agreement in question, however, gave SCA complete authority to approve costs, and the ability to exercise set-off. Because of this "substantial latitude in making and approving payments," the court again found no secure property interest. *Id.* at 639-640.

Thus in both cases relied upon by the state, it was the public body's *virtually unbridled discretion* to withhold payment under the contract (analogous to the discretion contained in an at-will employment agreement) which led

the court to conclude the asserted interests were not secure enough to give rise to a property interest in the first place.[6] In contrast, there was no such absolute discretion in the present case, nothing to suggest that the prime contractor could, *completely at its own discretion*, refuse to pay respondent where all work under the agreement had been undeniably performed. Stated differently, but for the intervention of a third party (the DLSE), respondent would have received its monies.

Thus the contractual earnings at issue in this case were functionally identical to the wages at issue in *Sniadach v. Family Finance Corp., supra*, 395 U.S. 337, and gave rise, as they did in *Sniadach*, to a protectible property interest.[7] See A-17. Accordingly, the Ninth Circuit correctly concluded that the seizure of respondent's earnings by order of the DLSE (a stranger to the contract) gave rise to a cognizable due process claim. See A-16 to A-21.

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[6] Indeed, in *Christ Gatzonis* the court initially observed "[i]t is well established that a contractor has a right to timely payment for work it performs under a contract with a state agency, and that such right is a property interest protected by the due process clause." *Id.* at 639. As noted, however, the court nevertheless concluded that the specific contract terms in that case overrode this general principle. Compare, e.g., *Signet Constr. Corp. v. Borg*, 775 F.2d 486 (2d Cir. 1985) (court finds that contractor's right to timely payment for work performed constitutes a protectible property interest).

[7] It bears emphasis that the Ninth Circuit found the seizure of respondent's earnings under the statutory scheme substantially damaged respondent's ability to do business. A-10.

C. The DLSE Was Not Party To Any Agreement Involving Respondent. Therefore, Although Respondent's Property Interest Arose From Contract, The DLSE's Infringement Of That Interest Was An Assertion Of Its Regulatory Powers, Not The Exercise Of A Contractual Right. The DLSE Had No Contract Rights To Assert Here.

The state argues that because the prevailing wage provisions must be contained in public works contracts, this case is really no more than a routine contract dispute, not deserving of due process scrutiny. Pet. at 12-16, 18-23; see also A-18. The Ninth Circuit appropriately rejected this argument, finding "this case does not involve a breach of contract claim or a challenge to the contract itself." A-18. Respondent did not allege that the state's enforcement actions somehow constituted a breach of contract. Indeed, respondent could not have made this allegation, because it had not entered into any contract with petitioners.[8] See A-19.

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[8] In fact, as noted, the state argued below that respondent had no standing to bring this action for declaratory relief because it was not in privity with the contracting public body. See A-11 to A-15.

In a related vein, the Ninth Circuit also rejected the state's contention that respondent could not state a due process claim because it was only indirectly affected by state action. The court found the state's reliance on *O'Bannon v. Town Court Nursing Ctr., supra*, 447 U.S. 773, "misplaced," correctly noting that on this record, respondent *was* in fact the direct target of the state's action. A-20 to A-21. The court also stated that, even assuming for sake of argument the state's actions against respondent were indirect, "such action would fall within the category expressly left open by the *O'Bannon* Court – action taken by the

The state's argument confuses the *creation* of a property interest with its *deprivation* by state action. While it is true respondent's property interest derived from contract, the state's infringement of that interest occurred from *outside* the contract. Significantly, no petitioner was party to any agreement under which respondent earned its monies. Respondent was deprived of its earnings because a stranger to the contract – the DLSE – ordered the contracting public entities to withhold monies representing civil penalties and forfeitures assessed against respondent. See Statement of the Case, *supra*. Under this statutory scheme, the awarding public body had no choice but to withhold the amounts ordered by the DLSE. See Cal. Lab. Code § 1727; see also *Krueger v. San Francisco*, 198 Cal.App.3d 1, 8, 243 Cal.Rptr. 585 (Cal. 1988).

The Ninth Circuit thus correctly pronounced that this case was not "a mere contractual dispute," but "a direct constitutional challenge to the state's *regulatory* power as embodied in these [Labor Code] statutes. . . . " A-19, emphasis added. This conclusion is in fact mandated by decisional law of the California Supreme Court. In *Lusardi Construction Co. v. Aubry* 1 Cal.4th 976, 4 Cal.Rptr. 837 (Cal. 1992), that court confirmed that the DLSE's duty to enforce the prevailing wage provisions is a statutory function which exists independent of any contractual provisions. In *Lusardi*, a hospital (wishing to expand its facility) agreed to act as "agent" for a private corporation and hire a contractor for the expansion. In that capacity, the hospital entered into an agreement with Lusardi, a

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government against one party for the purpose of punishing or restraining another." A-21.

contractor, omitting any provisions relative to the prevailing wage law. The DLSE, however, subsequently determined the construction was in fact a public work, subject to the prevailing wage laws, and threatened to enforce those statutes. Lusardi brought suit, arguing that because the terms of its contract did not expressly require payment of prevailing wages, it had no obligation to do so. California's high court rejected the argument, holding that whether or not they were incorporated into a contract, the Labor Code prevailing wage provisions were *statutory* requirements, "not limited to those workers whose employers have contractually agreed to pay the prevailing wage." *Id.* at 987.

Petitioners echo Judge Kozinski's dissent and claim the state should be treated the same as any other "marketplace participant" concerning its public works contracts. Pet. at 19-23; see also A-35 to A-38 [dissent]. This again misses the point. To repeat – petitioners were not parties to any of these public works contracts, and hence did not participate in this marketplace. The fact that *some* public body entered into a public works contract does not convert *petitioners'* status from outsider to marketplace participant. Stated more specifically, the DLSE and the DIR are not in privity with every public entity – municipal, county, or otherwise – entering into a public works contract. The California Supreme Court has confirmed as much:

> "In this case, there is no privity or identity of interest between the District [the awarding body] and the Director. Instead, there is a direct and palpable conflict. As its actions clearly evidence, the District had an interest in obtaining

> the lowest possible cost for the construction of the hospital expansion project. The interest of the Director is in enforcing the prevailing wage laws." *Lusardi Construction Co. v. Aubry, supra*, 1 Cal.4th at 995.[9]

In other words, the DLSE and DIR, in enforcing the prevailing wage provisions of the Labor Code, advance the policy interests of the state of California, not the proprietary interests of the state operating as a free market participant. See *id.*, at 987 (overall purpose of prevailing wage law is to benefit and protect employees on public works projects). The state's conduct in this regard is thus purely regulatory in nature. See also, e.g., *Wisconsin Dept. of Industry v. Gould Inc.*, 475 U.S. 282, 283-284, 287 (1986) (state was acting as regulator rather than proprietor for purposes of preemption analysis when, under state statute, it refused to do business with persons who had committed certain NLRA violations; state's action was to enforce the NLRA and deter labor law violations, and "no other purpose could credibly be ascribed").[10]

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[9] Moreover, even from the awarding bodies' perspective, to say that the withholding provisions *required by state law to be in the contracts* were the result of arms-length bargaining by marketplace participants is to indulge in fantasy. As the above quote from *Lusardi* suggests, it is unlikely the contracting public bodies would have bargained for prevailing wage provisions if acting purely to further their own proprietary interests like any other commercial entity.

[10] Citing decisions by this Court, petitioners argue that the state, in its proprietary role, can act like any other private contracting party in the marketplace. See Pet. at 20-23. That is not the point. The question is whether *in this case*, the state's conduct was proprietary. The Ninth Circuit found it was not. The analysis set forth above demonstrates the court was correct.

D. The Ninth Circuit Decision Does Not Conflict With Decisions Of Other Circuits.

In sum, the Ninth Circuit here applied basic due process analysis to a state agency's enforcement of California Labor Code provisions, where the enforcement deprived a party of monies already earned under a construction contract to which the agency was not a party. Under these circumstances, the court concluded adequate procedural protections must be provided. This unremarkable conclusion does not conflict, as the state would have this Court believe, with due process decisions from other circuits. See Pet. at 13-14.

In making its assertion of "conflict," the state again overlooks the fundamental distinction between the state acting in a proprietary capacity, and the state acting as a regulatory agency, as occurred in this case. The circuit court decisions cited by the state all involved due process claims brought against a contracting governmental body based upon an alleged breach of contract. The state defendants in those cases were parties to the contracts in question, and their conduct was assertedly an exercise of their contractual rights. None of those cases involved a situation where a contractor's earnings were seized by order of a non-contracting state agency enforcing state statutory provisions. See Pet., at 13-14, citing *S & D Maintenance Co., Inc. v. Goldin, supra,* 844 F.2d 962 (contract between plaintiff and city; city refused to pay, asserting contract rights); *Martz v. Village of Valley Stream,*

No decision of this Court cited by the state in its petition compels a contrary conclusion.

22 F.3d 26 (2nd Cir. 1994) (contract with village for attorney services; village refused to make payment, asserting contractual rights); *Christ Gatzonis Electrical Contractor, Inc. v. New York City School Construction Authority, supra,* 23 F.3d 636 (contract between plaintiff and construction authority; authority refused to pay, asserting contract rights); *Bleeker v. Dukakis,* 665 F.2d 401 (1st Cir. 1981) (plaintiff had at-will employment contract with Department of Public Health, and brought suit challenging termination); *Brown v. Brienen, supra,* 722 F.2d 360 (plaintiff employees alleged sheriff, county, and board breached contract to provide compensatory time off from their jobs); *Reich v. Beharry,* 883 F.2d 239 (3rd Cir. 1989) (contract between attorney and county for legal services; county controller refused to pay); *Linan-Faye Construction Co., Inc. v. Housing Authority,* 49 F.3d 915 (3rd Cir. 1995) (contract between plaintiff contractor and housing authority; authority terminated contract).[11]

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[11] We again point out that in *S & D Maintenance, supra,* 844 F.2d 962, and *Christ Gatzonis, supra,* 23 F.3d. 636, the Second Circuit found the contracts too insecurely held to give rise to a property interest in the first place. (See discussion *supra,* at subsection B.) In *Bleeker v. Dukakis, supra,* 665 F.2d 401, the First Circuit similarly held that an at-will employment contract did not create a protectible property interest. And in *Linan-Faye Construction Co., Inc. v. Housing Authority, supra,* 49 F.3d 915, the court found no protected interest because the contracting state entity could terminate the contract for reasons other than for cause, including mere convenience.

It should also be noted that the courts in *Reich v. Beharry, supra,* 883 F.2d 239, and *Brown v. Brienen, supra,* 722 F.2d 360, did not actually decide the question of whether the contracts at bar gave rise to protectible property interests, but instead based their decisions on other grounds.

Lastly, the state, again invoking Judge Kozinski's dissent, places particular emphasis on the Ninth Circuit's prior decision in *San Bernardino Physicians' Servs. Med. Group, Inc. v. County of San Bernardino, supra,* 825 F.2d 1404, contending the present decision ignores that earlier precedent. Pet. at 14-15. Not so. *San Bernardino* is not this case. There, a corporate physicians' group contracted with a county board of supervisors to provide professional services to the county medical center. The plaintiff medical group brought a due process claim against the board, alleging that conduct by the board and various county employees had forced the expiration of one of the group's contracts and the termination of the other. *Id.* at 1405-1406. The question before the court of appeals was thus whether the group's right to performance under its contracts with the board constituted a sufficient property interest to merit constitutional protection. *Id.* at 1407. The court confirmed that protectible property rights can be created by contract, *id.* at 1407-1408, but determined that the corporate employment contract at issue did not warrant due process protection, *id.* at 1409-1410.

Again, as with the other authorities relied upon by the state, *San Bernardino* involved a dispute between parties to a contract. The plaintiff and public entity were in contractual privity with each other, with the plaintiff's claim of a due process violation being predicated solely upon the defendants' alleged breach of contractual obligations. *San Bernardino* did not involve the statutory-based seizure of earned income by a state agency which was a stranger to the plaintiff's contract. That decision is

therefore inapposite, and was properly distinguished by the Ninth Circuit in its opinion below.[12]

In sum, as all the above makes clear, the state has asked this court to consider a question from which a necessary predicate – the elevation of a routine breach of contract action into a due process claim – is missing. As a result, what the petition essentially asks for is an impermissible advisory opinion. This Court should decline to render such opinion, and deny the petition.

II. A LAWSUIT FOR BREACH OF CONTRACT IS NOT A CONSTITUTIONALLY-ADEQUATE POST-DEPRIVATION HEARING AFTER THE SEIZURE OF FUNDS UNDER THESE CALIFORNIA LABOR CODE PROVISIONS.

Having determined that respondent's property interest in earnings seized by the state was protected by due process, the Ninth Circuit next considered what sort of process was constitutionally required here. Although respondent had asserted, and the District Court determined, that the Labor Code provisions in question were facially unconstitutional, the Ninth Circuit found the statutes were invalid as applied. The court held that to comply with due process requirements, the state must minimally provide the opportunity for a timely pre- or post-deprivation hearing regarding wages and penalties

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[12] Moreover, the alleged property right in *San Bernardino* – the group's interest in the continuation of its employment contract – is quite different from the interest at issue in this case: payment of income already earned.

seized from the earnings of contractors and subcontractors.[13] A-21 to A-24.

In determining that the Labor Code procedures failed constitutional scrutiny, the Ninth Circuit relied upon the fundamental due process notion that individuals must have notice "and a meaningful opportunity to be heard before the government deprives them of property." A-21, citing *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 48 (1993). The court noted that where a "valid governmental interest is at stake" postponement of the hearing may be justified until "after the initial deprivation." A-21 to A-22. Nevertheless, in such circumstances, "a *prompt* post-deprivation hearing must be held." A-22, citing *Federal Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 240 (1988), emphasis added. The court thus concluded that even though the state's interest in ensuring payment of a prevailing wage was sufficiently important to justify withholding funds, A-22 to A-23, the state must provide a pre-deprivation hearing or a prompt post-deprivation hearing "as required by the Due Process Clause." A-27.

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[13] The Ninth Circuit pointed out that while California's prevailing wage act was modeled on the Davis-Bacon Act, 40 U.S.C. §§ 276a et seq., the Davis-Bacon Act "provides for an extensive hearing and appeal structure through its implementing regulations." A-24 n. 11. These include procedures which allow the prime contractor or the subcontractor, within 30 days after a withholding, to request an administrative hearing to review the findings leading to the withholding. *Id.* The findings of the administrator may be appealed to an administrative law judge, and ultimately, to the federal court. *Id.*, citing 5 U.S.C. § 704.

Delay in providing such a hearing puts the very livelihood of the subcontractor at risk. As the Ninth Circuit emphasized:

> "The issuance of the notices to withhold had a substantial detrimental effect on G & G's ability to do business, as their effect is to reduce, or cut off, payments for work performed and to damage G & G's reputation in the industry. Inasmuch as G & G intends to perform further public works projects in the future, the issuance of additional improper notices to withhold also could impair G & G's cash flow and ability to do business." A-10.

The state argues, however, as it did below, that adequate process could be provided by a post-deprivation breach of contract action. Pet. at 23-25. This argument fails on two counts.

First and foremost –

> "Under California's Labor Code, a subcontractor cannot sue the state for withholding funds; only prime contractors can. A subcontractor theoretically could sue the prime contractor, but the latter has a defense of withholding the funds pursuant to state law. In addition, the Labor Code does not grant subcontractors the right to any type of hearing to contest a withholding. Therefore, if a prime contractor chooses not to contest a withholding or to assign its rights to sue to the subcontractor, the subcontractor is left holding a quite empty bag." A-15, fn. omitted; see also A-22 to A-23, A-27; Cal. Lab. Code §§ 1727, 1729, 1730, 1733.

In other words, a subcontractor like respondent can suffer severe economic injury as a result of state action

without having any reliable vehicle to challenge the state's conduct. This inability of the subcontractor to control its own rights or remedies after seizure of its earnings is a fatal constitutional defect in this Labor Code statutory scheme.

Second, even assuming a subcontractor could, in its own right, bring a statutory action against the awarding body challenging the withholding, such lawsuit, with its inherent delay, would not constitute an "opportunity to be heard at a meaningful time in a meaningful way." A-23; see also A-23 n. 9. It could take years to challenge the state's seizure through litigation, including potential appeal; in the meantime, the state retains possession of the withheld earnings. Cal. Lab. Code § 1731. Such delay could severely impact a subcontractor or contractor's business. See A-10. Even if the operation is successful, the patient dies.

Moreover, unlike a routine breach of contract action, California Labor Code section 1733 limits recovery by the contractor to withheld wages and penalties. As a result, a lawsuit brought under the statute would not compensate for consequential injuries caused by the state's interim deprivation pending resolution of the action. See Cal. Lab. Code § 1731, 1733. In a situation like respondent's, where the temporary deprivation can cause significant injury to reputation and economic stability, this supposed litigation remedy is therefore quite hollow. See A-10; see also *United States v. James Daniel Good Real Prop., supra,* 510 U.S. at 54-56 (availability of post-deprivation lawsuit could not compensate for the temporary deprivation that an earlier hearing might have prevented).

In concluding that a post-deprivation lawsuit did not satisfy due process in this case, the Ninth Circuit distinguished this Court's holdings in *Parratt v. Taylor*, 451 U.S. 527 (1981), overruled in part on other grounds by *Daniels v. Williams*, 474 U.S. 327 (1986), and *Hudson v. Palmer*, 468 U.S. 517 (1984), decisions relied upon by the state in its present petition. A-23 n. 9; Pet. at 26-27. In those cases, which involved claims by prison inmates that state employees had deprived them of personal property, the seizures occurred through the unauthorized negligent or intentional acts of individual state employees, not through implementation of a statutory procedure. This Court held that where "deprivations of property are effected through random and unauthorized conduct of a state employee, pre-deprivation procedures are simply 'impracticable' since the state cannot know when such deprivations will occur." *Hudson v. Palmer, supra*, at 533. In that situation, this Court determined, post-deprivation state tort remedies could provide adequate process. *Id.* at 534.

As the Ninth Circuit observed, however, no random and unauthorized act is involved in this case. A-23, n. 9. Here, the state's conduct is not only *authorized*, but is embodied in a statutory system. Where the state totally controls the procedures used to deprive a person of his property, *Parratt* and *Hudson* simply do not apply. See A-23, n. 9; compare also *Ingraham v. Wright*, 430 U.S. 651 (1977) (Court held that the presence of well-established regulations and safeguards to protect against the abuse of corporal punishment, combined with the availability of civil and criminal sanctions against teachers and school authorities, provided adequate process).

The state claims, though, that the Ninth Circuit's determination that a post-deprivation lawsuit is sufficient conflicts with decisions from other circuits which have held that a state lawsuit satisfies due process. Pet. at 23-27. Those decisions are distinguishable. In *Reich v. Beharry, supra*, 883 F.2d 239, for example, a county controller refused to authorize payments to an attorney who had done legal work under contract with the county. In *Brown v. Brienen, supra*, 722 F.2d 360, state employees asserted their employer had breached an agreement to give them unpaid, compensatory time off if they worked extra hours. Both cases thus involved singular breaches of contract. Here, in contrast, the state enforced a statutory scheme which enabled the systematic and repetitive seizure of earnings from respondent. Moreover, neither *Reich* nor *Brown* described the sort of disabling – and ongoing – economic consequences described by the court of appeals in this case. See A-10. Further, there was no indication in either *Reich* or *Brown* that a recovery by those plaintiffs for breach of contract could not compensate for the deprivations they had suffered in the interim. As discussed above, just the opposite is true here – not only are such damages precluded by the prevailing wage statutes, but even if available, they would be unlikely to compensate the injury incurred while the state retained respondent's earnings.

The state suggests that two additional post-deprivation litigation remedies were available to respondent:

equitable subrogation and filing a "stop notice."[14] Pet. at 24-25. Neither of these procedures, however, would satisfy the due process concerns which underlie the Ninth Circuit decision. First, respondent could *not* bring an action against the awarding body under a theory of equitable subrogation because, as the Ninth Circuit pointed out, the facts in this case simply "do not meet the traditional elements of equitable subrogation." A-24, citing *Caito v. United California Bank*, 576 P.2d 466, 471 [20 Cal.3d 694] (Cal. 1978). Those elements are:

> " '(1) Payment must have been made by the subrogee to protect his own interest. (2) The subrogee must not have acted as a volunteer. (3) The debt paid must be one for which the subrogee was not primarily liable. (4) the entire debt must have been paid. (5) Subrogation must not work any injustice to the rights of others.' " *Id.*, citations omitted.

The first element is inapplicable here, because the "payment" made by respondent was not made on behalf of anyone else: respondent cannot subrogate to anyone's position, because no one else "owes" the asserted debt. The second element is also inapplicable, because although respondent was certainly not a "volunteer," it equally did not "act." Payment was withheld from it, not "paid" by it. Similarly, respondent does not meet the

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[14] The "stop notice" argument was raised by the state for the first time in its second petition for rehearing The state's failure to raise this argument prior to its second petition for rehearing waives the issue. See, e.g., *Boardman v. Estelle*, 957 F.2d 1523, 1534 (9th Cir. 1992).

third criteria, for while there has never been any determination of "liability," if anyone is the "object" of the state's withholding, it is respondent. The subrogation shoe does not fit respondent. See A-24, n. 9.

Finally, even assuming the "stop notice" argument has not been waived, the state does not explain how this procedure could override the rigorous enforcement provisions of California's prevailing wage law so as to provide a prompt and meaningful hearing to respondent. These Labor Code provisions, as noted, authorize the awarding body to withhold forfeited sums from the prime contractor who, in turn, has a statutory defense to any claim for those funds by the subcontractor. The state cites no authority which holds that this fixed statutory scheme is somehow subordinated to a "stop notice" proceeding or that such proceeding would satisfy the Ninth Circuit's appropriate due process concerns.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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BARCLAYS OFFICIAL CALIFORNIA
CODE OF REGULATIONS

TITLE 8. INDUSTRIAL RELATIONS

DIVISION 1. DEPARTMENT OF INDUSTRIAL RELATIONS CHAPTER 8. OFFICE OF THE DIRECTOR SUBCHAPTER 3. PAYMENT OF PREVAILING WAGES UPON PUBLIC WORKS

ARTICLE 7. WITHHOLDING OF FUNDS FROM CONTRACTOR – HEARING PROCEDURE

8 CCR 16410 (1999)

§ 16410. Definitions

As used in these regulations, the terms "awarding body," "contractor," and "subcontractor" shall have the same meaning as in Part 7 of Division 2 of the Labor Code. The term "affected subcontractor" shall mean a subcontractor whose alleged failure to pay the prevailing wage or to otherwise comply with the provisions of Labor Code §§ 1720-1815 resulted in the withholding of funds pursuant to Labor Code § 1727.

AUTHORITY:

Note: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1727, 1730, 1731, 1732, 1733, 1775, 1776(g) and 1813, Labor Code.

HISTORY:

1. New article 7 (sections 16410-16414) and section filed 2-16-99 as an emergency; operative 2-16-99 (Register 99, No. 8). A certificate of Compliance must be transmitted to OAL by 6-16-99 or emergency language will be repealed by operation of law on the following day.

§ 16411. Notice to Contractor and Affected Subcontractor

(a) Upon the decision to withhold, retain or forfeit any sum from a payment due to a contractor as permitted by Labor Code § 1727, the Division of Labor Standards Enforcement shall give written notice to the awarding body, the contractor, and to any affected subcontractor, of the withholding, retention, or forfeiture.

(b) Said notice shall include the following information:

(1) The amount to be withheld, retained or forfeited.

(2) A short statement of the factual basis upon which said amount is to be withheld, retained, or forfeited, including, but not limited to, the computation of any wages found to be due, and the computation of any penalties assessed under Labor Code § 1775.

(3) Notice of the right to request a hearing under these regulations, and of the manner in which, and the time within which a hearing must be requested.

(c) Said notice shall be sent by certified mail to the last known address of the contractor, and to the last known address of any affected subcontractor. The records of the State Contractors' License Board may be used to determine the address of a contractor or affected subcontractor.

AUTHORITY:

Note: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1727, 1730, 1731, 1732, 1733, 1775, 1776(g) and 1813, Labor Code.

§ 16412. Withholding, Retention, or Forfeiture

(a) When notice has been sent as provided in section 16411, above, the awarding body shall proceed to withhold, retain, or forfeit the amount stated in the notice, pursuant to Labor Code § 1727. Such withholding, retention, or forfeiture shall be subject to the right of a contractor or affected subcontractor to request a hearing, as provided in section 16413, below, and further subject to the right of a contractor or a contractor's assignee to bring suit against the awarding body as provided by Labor Code §§ 1731-1733.

(b) Nothing in these regulations shall extend, or affect in any way, the statutory time limits provided by Labor Code §§ 1731-1733.

AUTHORITY:

Note: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1727, 1730, 1731, 1732, 1733, 1775, 1776(g) and 1813, Labor Code.

§ 16413. Request for Hearing

(a) A contractor or subcontractor desiring a hearing regarding the withholding, retention, or forfeiture of an amount may request such a hearing by letter postmarked

within 30 days of the date of the mailing of the notice provided by section 16411, above, mailed to the awarding body, and to:

Division of Labor Standards Enforcement
Legal Section
455 Golden Gate Avenue, 9th floor
San Francisco, California 94102

(b) A request for hearing shall contain a statement of all factual and legal grounds upon which the withholding is contested, identifying the specific element or elements, issue or issues, being contested, including, but not limited to:

(1) the classification of workers included in the computation of wages found to be due;

(2) the hours worked by such workers;

(3) the prevailing wage requirements applicable to such classifications;

(4) the amounts paid to such workers;

(5) the assessment and computation of statutory penalties;

(6) any erroneous mathematical calculations.

Assertions of fact included in the statement shall be supported by documentary evidence, e.g., time cards, canceled checks, cash receipts, trust fund forms, books, documents, schedules, forms, reports, receipts or other evidence which reflect job assignments, work schedules by days and hours, and evidence of the disbursement by way of cash, check, or in whatever form or manner, of funds to a person or persons by job classification and/or

skill, and, if appropriate, declarations under penalty of perjury.

AUTHORITY:

Note: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1727, 1730, 1731, 1732, 1733, 1775, 1776(g) and 1813, Labor Code.

§ 16414. Hearing

(a) Upon receipt of a timely request for a hearing, the Labor Commissioner, or his or her deputy or agent shall, within 30 days, hold a hearing to determine whether reasonable cause exists to withhold and retain the funds identified in the notice provided under section 16411, above.

(b) The hearing date may be continued at the request of the party seeking the hearing upon a showing of good cause.

(c) The burden of proof at such hearing shall be as provided in Labor Code § 1733.

(d) The decision of the Labor Commissioner shall consist of a notice of findings, findings, and an order, which shall be served on the awarding body and all parties to the hearing within 15 days after the conclusion of the hearing by regular first class mail at the last known address of the party on file with the Labor Commissioner. The awarding body shall promptly abide by any decision of the Labor Commissioner with respect to the notice to withhold.

(e) The hearing pursuant to this section shall only determine whether reasonable cause exists for the withholding, retention, or forfeiture of funds pursuant to Labor Code § 1727. A hearing pursuant to this section shall not be deemed to be dispositive as to the contractor's (or affected subcontractor's) compliance with prevailing wage laws. Any decision rendered shall have no res judicata or collateral estoppel effect, and will not preclude the Labor Commissioner from pursuing any action provided by Labor Code § 1775 or any other statutory or common law remedy against any party. Neither the failure of a party to request a hearing nor the Labor Commissioner's decision after a hearing shall preclude the contractor or affected subcontractor from pursuing any other remedy provided by existing law.

AUTHORITY:

Note: Authority cited: Section 1773.5, Labor Code. Reference: Sections 1727, 1730, 1731, 1732, 1733, 1775, 1776(g) and 1813, Labor Code.